IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 112 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
J H PARABIA(TRANSPORT)P.LTD. - Respondent(s)

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Appearance :
MR TANVISH U BHATT for Applicant(s) : 1,
MR RK PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 16/02/2006
ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'C' has referred the following question under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> *"Whether on the facts and circumstances of the case and in law, the Tribunal was right in deleting the penalty levied u/s.271(1)(c) by the Assessing Officer even though the assessee is engaged in the contract business of material handling and is a Pvt.Ltd.Co., for not showing the amount of work uncertified in the credit side of the P & L account and thereby not furnishing accurate particulars of its income in the original return of income filed by it and assessee filed revised return only when it was pointed out by the Assessing Officer, though under law the*

assessee was duty bound to do that and to pay tax accordingly?"

2 Heard Mr. T.U.Bhatt, learned Standing Counsel for applicant-revenue and Mr.R.K.Patel, learned Advocate for the respondent-assessee.

3 The Assessment Year is 1990-91 and the relevant accounting period is the financial year ended on 31/3/1990. The facts as recorded by the Tribunal while passing the impugned order dated 28/2/1994 reveal that the assessee originally filed return of income showing income of Rs.12,67,206/- The said return of income was revised upwards by filing revised return on 20/11/1991 showing income of Rs.13,30,110/-. The Assessing Officer found that the profit and loss account did not contain any entry by way of work-in-progress or work uncertified and therefore called upon the assessee to show cause why the same should not be treated as income.

Hence the assessee filed the revised return of income and gave details of the work-in-progress. The assessee accordingly by way of revised return offered a sum of Rs.13,60,883/- as income receivable. The assessee claimed expenses amounting to Rs.7,00,110/- being expenses which were actually incurred but not provided. A sum of Rs.5,60,000/- was also shown by the assessee as having wrongly been treated as income. The Assessing Officer accepted the aforesaid two errors and ultimately assessed the income at a figure of Rs.13,44,440/-.

4 However, when penalty proceedings were initiated and penalty order was made the Assessing Officer sought to quantify the penalty with reference to concealment of Rs.14,03,311/- which came to be modified by Commissioner (Appeals) at a figure of Rs.7,03,202/-. The Assessing Officer levied the

penalty amounting to Rs.8,33,566/- but CIT (Appeals) granted partial relief by modifying the basis while upholding penalty.

5 The Tribunal in its impugned order noted that the difference between the originally returned income and the revised returned income was only a sum of Rs.63,000/-, while the difference between the original income and the assessed income was about Rs.77,000/-. Meaning thereby the difference between the revised return and the assessed income was only to the tune of Rs.14,000/-. The Tribunal has recorded that this difference between the returned income and the assessed income is far more less than the income alleged to have been concealed only because, on the one hand the assessee did not show the value of the work in progress, while on the other hand there were various errors of including as income items which were not really taxable. After analysing

the evidence available on record the Tribunal has recorded that there were many omissions and mistakes in the original return of income and hence when the error on both sides viz.items omitted to be shown as income, and items shown as income though not income, are considered together it became apparent that there was no intention to conceal income or any intention to furnish inaccurate particulars of income.

6 The tribunal has further found as a matter of fact that the assessee had been consistently adopting the same method of accounting i.e. of not including the work-in-progress for the purpose of arriving at the taxable income since inception of the company. It has further been found by the Tribunal that this method of accounting has been accepted by the department. It has further been recorded by the Tribunal that in these circumstances, in case of the assessee,

a limited company, there would be either nil or negligible tax effect when one considers the fact that item of work-in-progress which is not shown in year number one is reflected as income in any one of the subsequent years when the amount is actually received and hence, the department could not allege that the assessee had adopted a systematic device for postponing a part of the tax liability. The Tribunal further goes on to record that, in fact there is no allegation on this count made by the department and even if the same is taken into consideration, there was no evidence to substantiate such allegation. The Tribunal concludes by holding that the assessee adopted a particular system of accounting for four assessment years, including the year under consideration, and for three preceding assessment years the said system has been accepted by the department; but when the department sought to take a different stand in

the fourth year the assessee gracefully submitted a revised return offering the item for taxation and accepted the assessment made. Thus, it was concluded by the Tribunal that exigibility of penalty under section 271(1)(c) of the Act would depend upon facts and circumstances of the case, and after considering the totality of the facts and circumstances the assessee could not be charged with concealment of income or with furnishing inaccurate particulars thereof.

7 As can be seen from the question raised and referred the entire submission of revenue and the basis of levy of penalty gets summarised in the frame of the question. However, in light of the facts found by the Tribunal, and in absence of any evidence to show that such findings are incorrect in any manner whatsoever, it is not possible to accept the contention raised on behalf of the applicant-revenue. It is not

possible to state that the method of accounting adopted by the assessee was such that it did not reflect the position correctly considering the fact that for three years the same had been accepted by the department. Once this was the position, the bonafides of the assessee could not be doubted, and the Tribunal was justified in holding that the assessee was entitled to hold a bonafide belief that the uncertified work-in-progress was not liable to be treated as a taxable item so as to be visited with penalty for concealment thereof.

8 In these circumstances, the question is answered in the affirmative i.e. in favour of the assessee and against the revenue.

9 Reference stands disposed of accordingly. There shall be no order as to costs.

Sd/- Sd/-
(D.A.MEHTA,J) (H.N.DEVANI,J)

m.m.bhatt